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February 15, 2019

BY ELECTRONIC DELIVERY

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street S.W.
Washington D.C. 20554

Re: Permitted Written *Ex Parte* Letter
Petition of Charter Communications, Inc.,
For a Determination of Effective Competition in:
Massachusetts Communities and Kauai, Hawaii
MB Docket No. 18-283; CSR No. 8965-E

Dear Ms. Dortch:

The State of Hawaii (the "State"),[1] by its attorneys, hereby responds to the February 1, 2019 letter of Charter Communications, Inc. addressing the "facilities" requirement in the local exchange carrier ("LEC") portion of the effective competition test (*i.e.*, the "LEC Test").[2]

Section 543(l)(1)(D) of the Communications Act applies the LEC Test to "a local exchange carrier or its affiliate (or any multichannel video programming distributor using the facilities of such carrier or its affiliate)." In its letter, Charter goes to great lengths to argue that the rules of statutory construction dictate that the term "facilities" in the above quoted phrase modifies the term "multichannel video programming distributor" and not the phrase "local exchange carrier or its affiliate." Charter's lengthy lesson on the last antecedent rule is unnecessary, however, because the State never claimed otherwise.

Instead, the State has always asserted that the term "facilities" in Section 543(l)(1)(D) evidences Congress' clear *intent* to apply its LEC Test only to carriers that use their facilities to provide video programming in competition with a cable television operator. Such an outcome is logical because a LEC's extensive facilities in a community—including a wireline connection to

[1] This letter is being submitted on behalf of the State of Hawaii through its Department of Commerce and Consumer Affairs, which is the cable franchise authority for the State.

[2] *See* Letter from Howard J. Symons, Jenner & Block LLP, to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 18-283 (Feb. 1, 2019) ("*Charter Letter*").

every home—give it a significant advantage in introducing competition to cable television operators in the provision of multichannel video programming.

Apparently aware of this fact, Charter addresses this argument as well in its letter, but not in a convincing manner. Specifically, Charter claims that the significant advantage enjoyed by LECs does not result from its extensive facilities in a community, but because they are powerful competitors with strong market power.[3] Of course, at the time that the Telecommunications Act of 1996 ("1996 Act") was adopted by Congress, many other companies qualified as powerful competitors with strong market power in the provision of various services to consumers.[4] Congress focused solely on LECs, however, in recognition of the fact that only LECs had wireline connectivity to every home and therefore could rapidly compete on a head-to-head basis with cable television in the provision of multichannel video programming. Further, as Congress recognized, this competitive advantage could be enjoyed by any multichannel video programming distributor ("MVPD") that uses the facilities of a LEC.

Charter next argues that "even if the facilities requirement applies to LECs and LEC affiliates, it applies to them only to the extent they are acting as MVPDs."[5] This claim cannot be aligned with Section 543(l)(1)(D) of the statute. The only reference in the statutory LEC Test to MVPDs is in reference to *other* entities that may be providing video programming services to subscribers, not to LECs. Thus, if the facilities requirement applies to LECs and their affiliates—which was Congress' clear intent—then the issue of whether a LEC is acting as a MVPD or a cable franchisee is irrelevant.

As for the statutory reference to "by any means," the State has previously explained that this language resulted from efforts by a conference committee to harmonize the House version of the 1996 Act—which referenced a LEC's provision of "video dialtone service" or using a cable franchise[6]—and the Senate version of Act—which referenced "a common carrier video platform" or as a cable operator[7]—while also including such facilities-based options as MMDS and LMDS.[8] Thus, no Congressional intent existed to expand the reach of its LEC Test to include Online Video Distribution using the broadband networks of other parties, particularly given the fact that such

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[3] *See id.* at 3.

[4] For example, in 1996, the largest companies in the United States included General Motors, Exxon Mobile and Wal-Mart, all of which were then larger than AT&T. *See* http://archive.fortune.com/magazines/fortune/fortune500_archive/full/1996/ (*last visited* Feb. 14, 2019).

[5] *Charter Letter* at 3.

[6] S.652 as passed by the House of Representatives, with Amendments, October 12, 1995, § 202(h) (104th Congress).

[7] S.652 as passed by the Senate, June 15, 1995, § 203(b)(2) (104th Congress).

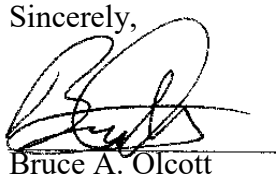
[8] Senate Report No. 104-230, Conference Report to accompany S. 652, at 170, February 1, 1996 (104th Congress).

capabilities did not yet then exist. This also explains why Congress did not include the phrase "facilities-based" in Section 543(l)(1)(D) in direct reference to a LEC's provision of video programming services to consumers—at the time the 1996 Act was adopted, facilities-based delivery platforms were the only means that were technically available.

Given this, the Commission should conclude that the most logical and reasonable interpretation of the statutory LEC Test is that it applies solely to LECs that use their own facilities to provide multichannel video programming in competition with an incumbent cable television operator. Any other interpretation of the statute would create an unwarranted exception to the effective competition requirement and would remove the protections of rate regulation from those remaining communities where effective competition does not yet exist in the distribution of multichannel video programming services.

Please contact the undersigned if you have any questions about this matter.

Sincerely,



Bruce A. Olcott